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NO. _____

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

NED LUTZ,

Petitioner,

vs.

STATE OF OHIO,

Respondent.

PETITION FOR WRIT OF CERTIORARI (ON WRIT OF CERTIORARI FROM THE SUPREME COURT OF OHIO)

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QUESTION PRESENTED

Whether Petitioner was denied his right to a speedy trial under the Sixth and Fourteenth Amendments to the United States Constitution and under Section 2945.71 of the Ohio Revised Code?

II.

LIST OF ALL PARTIES TO THE PROCEEDING IN THE COURT WHOSE JUDGMENT IS SOUGHT TO BE REVIEWED

Ned Lutz, Petitioner

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REFERENCE TO THE OFFICIAL AND UNOFFICIAL REPORTS OF ANY OPINION DELIVERED IN THE COURTS OR ADMINISTRATIVE AGENCY BELOW

The opinion delivered in the court below is not reported in any official or unofficial reports.

GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

Ned Lutz is before this court on his petition for certiorari from the judgment of the Court of Appeals for

Coshocton County, Ohio, Fifth Appe' :e District, which affirmed the verdict and judgment of the Coshocton County Court of Common Pleas, on July 12, 1982, and from the judgments of the Supreme Court of the State of Ohio which overruled his motion for leave to appeal and dismissed his appeal as of right on October 6, 1982. He submits this Jurisdictional Statement to demonstrate this Court's jurisdiction for review by Writ of Certiorari pursuant to 28 U.S.C. Sec. 1257 (3).

There have been no orders respecting a re-hearing and no orders granting an extension of time within which to petition for certiorari.

OPINION BELOW

The opinion of the Court of Appeals for Coshocton County, Ohio, Fifth Appellate District (CA 81 18) is unreported, but is attached as Appendix A. The entries from the Supreme Court of the State of Ohio are attached as Appendix B.

CONSTITUTIONAL PROVISIONS AND STATUTES WHICH THE CASE INVOLVES

UNITED STATES CONSTITUTION AMENDMENT VI

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

UNITED STATES CONSTITUTION
AMENDMENT XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2945.71 (C), Ohio Revised Code:

A person against whom a charge of felony is pending:

. . .

(2) Shall be brought to trial within two hundred seventy days after his arrest.

Section 2945.72, Ohio Revised Code:
The time within which an accused must be brought to trial, or, in the case of felony, to preliminary hearing and trial, may be extended only by the following:

. . .

(E) Any period of delay necessitated by reason of a plea in bar or abatement, motion, proceeding, or action made or instituted by the accused;

. . .

(H) The period of any continuance granted on the accused's own motion, and the period of any reasonable continuance granted other than upon the accused's own motion.

Rule 8 (B), Rules of Superintendence of The Supreme Court of Ohio:

(B) Criminal Trials. All criminal cases shall be tried

within six months of the date of arraingment on an indictment or information.

Any failure, and the reason therefor, to comply with the time limits specified in this rule shall be reported immediately to the Chief Justice of the Supreme Court by the administrative judge of the division in which such failure occurs. In a single-judge division such failure shall be reported by the judge. The Chief Justice is authorized to take such action as may be necessary to cause any such delinquent case to be tried forthwith.

Section 2921.02 (A), Ohio Revised Code:

No person, with purpose to corrupt a public servant or party official, or to influence him with respect to the discharge of his duty, whether before or after he is elected, appointed, qualified, employed, summoned, or sworn, shall promise, offer, or give any valuable thing or valuable benefit.

STATEMENT OF THE CASE

This is a criminal case.

Petitioner, Ned Lutz, was arrested on September 19, 1980, on an affidavit charging him with bribery under Section 2921.02 (A) filed in the Municipal Court of Coshocton County, Ohio. Petitioner was held in jail until bond was posted the same day. On October 1, 1980, the affidavit was dismissed by the Coshocton Municipal Court. On October 3, 1980, the Coshocton County, Ohio Grand Jury indicted Petitioner for the same offense. Petitioner was again arrested on October 9, 1980, and he spent part of such day in jail until bond was posted on the same day.

On October 21, 1980, Petitioner filed a motion to dismiss the indictment on grounds of double jeopardy, which motion was denied by the Common Pleas Court of Coshoc-

ton County, Ohio, on November 12, 1980. The case was then set for pretrial on May 27, 1981, and the matter was set for trial for June 16, 1981.

On June 10, 1981, the State of Ohio filed a motion with the trial court asking continuance of the cause for trial citing the absence of a State's witness who was not identified or shown to have been under subpoena by the State of Ohio. Without Petitioner's consent, and without hearing on such motion, the trial court granted such motion by judgment entry endorsed on such motion and set a new trial date of July 7, 1981.

On June 17, 1981, Petitioner filed his motion to dismiss the indictment for the reason that he had not been accorded a speedy trial. This motion was denied by the trial court on July 13, 1981. The trial commenced on July 14, 1982.

The trial court in overruling the Petitioner's motion to dismiss held that the eight (8) days between the dismissal of the affidavit in Coshocton Municipal Court and Petitioner's indictment by the Grand Jury could not be counted under Section 2945.71 (C) (2). The trial court further held that the twenty-one (21) days during which the trial court was considering Petitioner's motion to dismiss the indictment filed on October 21, 1980, extended the time for trial under Ohio Revised Code Section 2945.72. The trial court further held that the time period extending the trial date to July 7, 1981, occasioned by the State's request for continuance filed on June 10, 1981, was permitted under Ohio Revised Code Section 2945.72 as an extension for "the period of any reasonable continuance granted other than upon the accused's own motion " Such time period extended hearing date for twenty-one additional days. The trial court did not find that any such motions necessitated any delay in the hearing.

On appeal, the Court of Appeals for Coshocton County, Ohio, held that the eight (8) day time period between dismissal in the Municipal Court and the arrest on the indictment by the Grand Jury was time chargeable to the State under Ohio Revised Code Section 2945.71, but held that the twenty-one days the trial court considered Petitioner's motion to dismiss the indictment filed October 21, 1980, and the seventeen day extension of time for hearing on the State's motion for continuance filed June 10, 1981, was time chargeable to Petitioner under Ohio Revised Code Section 2945.72 and extended the time for trial accordingly.

The trial court and the Court of Appeals held that Ohio Supreme Court Superintendence Rule 8 did not entitle Petitioner to dismissal of the indictment.

As indicated above, the question presented by this petition was timely and properly raised so as to give this court jurisdiction to review the judgment on writ of certiorari.

ARGUMENT

The Petitioner was denied his right to a speedy trial under the Sixth and Fourteenth Amendments to the United States Constitution and under Section 2945.71 of the Ohio Revised Code. Moreover, Rule 8 (B) of the Rules of Superintendence of the Supreme Court of Ohio was violated by Respondent.

The speedy trial provisions of the Sixth Amendment to the United States Constitution have been made applicable to the states through the Fourteenth Amendment to the United States Constitution. *Klopfer* v. *North Carolina,* 386 U.S. 213 (1967). Petitioner's rights to a speedy trial were violated in this case under the standards set forth in *Barker* v. *Wingo,* 407 U.S. 514 (1972) and *Moore* v. *Arizona,* 414 U.S. 25 (1973).

In this case the State of Ohio filed a motion for continuance six days before the date set for trial. No witnesses were under subpoena; no name of any witness was given as being out of the country that was necessary to the prosecution, nor was there any time element given as to the return of such witness. By judgment entry endorsed on the motion prepared by the State of Ohio and without notice to or hearing opportunity given to Petitioner, the trial date was extended from June 16, 1981, to July 7, 1981. Such facts present a strong conclusion that there was not due diligence exercised in preparing the case for trial to commence on the date set. The State of Ohio was not, in good faith, attempting to try the case within the time limits set by the court for trial. Such delay should not be charged to Petitioner as a reasonable basis for continuance under Section 2945.72 (H) of the Ohio Revised Code. See *State* v. *Reeser,* 63 Ohio St. 2d 189 (1980); *State* v. *Pudlock,* 44 Ohio St. 2d 104 (1975).

A motion or pleading filed by a Defendant in a criminal case does not automatically trigger the permissible extension time for trial under Ohio Revised Code Section 2945.72 (E). Such a motion must be found to have necessitated a delay in the trial of the cause. A trial court does not have unbridled discretion concerning the amount of time it takes to rule on a defense motion. The twenty-one days during which the trial court was considering Petitioner's motion to dismiss the indictment filed on October 21, 1980, did not extend the trial time and the trial court did not specifically so find. Where the trial court did not find that the time in considering a defense motion to dismiss was a necessary delay in the trial date, the time for such disposition of such motion does not extend the trial time under Ohio Revised Code Section 2945.72 (E). *State* v. *Martin,* 56 Ohio St. 2d 289 (1978).

Rule 8 (B) of the Rules of Superintendence of the Supreme Court of Ohio requires the dismissal of the charge against the Petitioner as he was not tried within six months after the time of his arraignment. Merely because the rule does not specify the remedial procedure, a court is not prevented from instituting dismissal of the charge upon a finding of violation of the rule.

Considering the entire case in conjunction with the Sixth and Fourteenth Amendments to the United States Constitution and the pertinent sections of the Ohio Revised Code cited herein, Petitioner was denied his right to a speedy trial.

CONCLUSION

For the reasons stated, the question presented is substantial and is of great public importance. Petitioner respectfully requests this Court to require the State of Ohio to comply with the constitutional standards of the Sixth and Fourteenth Amendments to the United States Constitution and Section 2945.71 of the Ohio Revised Code, to reverse Petitioner's conviction, and to order the charge against him dismissed.

Respectfully submitted,

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